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IN THE

Supreme Court of the United States

October Term, 1979

JICARILLA APACHE TRIBE,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

STATE OF NEW MEXICO,
Amicus Curiae.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF NEW MEXICO IN OPPOSITION

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New Mexico's Statement of the Case will show an absence of genuine controversy between the parties to this Petition for Writ of Certiorari. We respectfully suggest, therefore, that this brief – being the only one in opposition – may be as useful as the parties' briefs in determining whether the writ should issue.

OPINIONS BELOW/JURISDICTION

We do not disagree with the Jicarillas' statements pursuant to Rules 40(1) (a) and (b) of the Rules of the Supreme Court.

QUESTION PRESENTED

The Jicarillas' list of questions presented is deceptive. Instead of the four questions set forth in the Petition, there is properly one question presented: Is the act of Congress which gives concurrent federal and state court jurisdiction to adjudicate federally owned reserved water rights held on behalf of Indians applicable to the ten western states whose enabling acts and constitutions recite that Indian reservation lands "shall be and remain under the absolute jurisdiction and control of the Congress of the United States?"

STATEMENT OF THE CASE

The Jicarillas' Statement of the Case is misleading in three important respects: 1) it does not inform the Court of the conflict of proceedings which frames the jurisdictional issue; 2) it distorts the nature and purpose of the pending adjudication in state court; and 3) it misstates the holding of the Tenth Circuit.

1) Conflict of proceedings – On March 13, 1975, the State of New Mexico filed in New Mexico District Court for the County of San Juan a general water rights adjudication pursuant to §72-4-15 et seq. N.M.S.A. 1978 for the determination of all of the rights to the use of the surface and underground waters of the San Juan River stream system, including the Navajo River and its tributaries. *State of New Mexico ex rel. S. E. Reynolds, State Engineer v. United States of America, et al.,*

No. 75-184. Pursuant to the McCarran Amendment, 43 U.S.C. §666, the United States was named as a party defendant in its own behalf and on behalf of three dependent Indian tribes, including the Jicarilla Apache Tribe, who enjoy the use of federally-owned Indian reservation lands within the stream system in New Mexico.

Following an unsuccessful attempt to obtain an adjudication of their rights in federal district court in Colorado, two unsuccessful attempts by the United States to remove the San Juan action to federal district court in Albuquerque, two remands, and three unsuccessful motions to dismiss, the Jicarillas filed the suit below in federal district court in New Mexico, naming the United States as a party defendant under the McCarran Amendment. In its Answer the United States conveniently admitted the Jicarillas' allegation of jurisdiction.

In light of the eighth interruption in the pending state court adjudication, New Mexico appeared *amicus curiae* in the Jicarillas' federal court proceeding and filed a Suggestion of Want of Jurisdiction, urging the district court to dismiss the Tribe's attempt to obtain a separate adjudication of the United States' claims on its behalf. The court dismissed the action *sua sponte* on July 19, 1977, more than two years after New Mexico had initially undertaken a statutory adjudication in state court of the rights in question.

The case was appealed against the United States, and the State of New Mexico again appeared in the Tenth Circuit as *amicus curiae,* both by brief and oral argument. The Tenth Circuit affirmed the district court's dismissal. New Mexico has never been a party to these proceedings, but because of the lack of case or controversy between the Jicarillas and the United States, we have been forced to enter our appearance *amicus* at every level, including this appearance to oppose the Petition for Writ of Certiorari.

2) The purpose and value of the state court adjudication – In their Statement of the Case the Jicarillas declare: "At this writing there have not been any proceedings in the state court suit other than hearings on motions to intervene and to dismiss and the removal petition. There has not been any discovery and the court has not entered any pretrial orders." (Petition, p. 8). The statement is untrue. Since the filing of the state court adjudication on March 13, 1975, 1,594 parties defendant have been added. Without court order pursuant to Rule 26 of the Rules of Civil Procedure, but by means of some of the techniques described therein, the State of New Mexico has discovered and surveyed the history of diversion and application to beneficial use made by nearly all of the named defendants. On the basis of the discovery completed by the plaintiff since 1975, it can be expected that 95% of the individual water rights will be stipulated and decreed.[1] The statement that there has been no discovery and the suggestion that the state court action was filed to adjudicate only federal claims are absolutely false.[2]

1. There has been no discovery to date of the reserved right claims of the United States on behalf of the Jicarilla Apache Tribe because the Tribe requested counsel for the State of New Mexico to postpone discovery until their own contractors had compiled requisite information. Adjudication of the federal claims has also been delayed because of the protracted jurisdictional debate. Similarly, in 13 other general adjudications pending in New Mexico for as long as 14 years, the federal claims have not yet been determined because of the persistence of the United States in finding some jurisdictional basis upon which to interrupt the litigation.

2. In 1948 the rights of approximately 1100 non-federal claimants to San Juan waters were determined in the First Judicial District of New Mexico, within and for San Juan County. The hydrologically related groundwater rights were not adjudicated, and the State of New Mexico was not a party. Because of the rapid development of uranium and coal in northwestern New Mexico, however, the State Engineer determined

3) The Tenth Circuit holding – Finally, the Jicarillas state that the Tenth Circuit "held that the Indian disclaimer provisions in New Mexico's Enabling Act and Constitution do not preclude the adjudication of Indian water rights in New Mexico's courts because the disclaimer is limited to matters of a proprietary, as opposed to governmental nature." (*Id.*, p.9). While that was a conclusion of the Tenth Circuit, it did not so hold. It held that in enacting the McCarran Amendment the Congress *exercised* its absolute jurisdiction and control over federal Indian reservations. The Circuit Court said that the state's adjudicatory jurisdiction over the United States' claims on behalf of the Jicarilla Apache Tribe in no way conflicts with its disclaimer provisions, but, on the contrary, complements them. (Petition, App. 30a, 32a-33a). Accordingly, if a writ of certiorari were to issue to the Tenth Circuit it would not facilitate a review of whether the disclaimer provisions are proprietary or governmental. It would facilitate review of whether the McCarran Amendment was an exercise of Congress' authority over Indian reservations, which has already been decided by this Court in precisely the same way as the Tenth Circuit decided it below.

REASONS FOR DENYING THE WRIT

POINT I: THE ISSUE HAS ALREADY BEEN DECIDED BY THIS COURT.

In *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976), the Court held that the McCarran

2. cont.
in 1975 that a comprehensive adjudication of the numerous conflicting claims to water should be undertaken, a decision which resulted in the filing of the pending state court adjudication. Unlike the earlier action, the pending action is a statutory adjudication involving all of the interrelated claims to San Juan waters.

Amendment authorizes state court jurisdiction to adjudicate federally reserved Indian water rights.[3] Therefore, at the heart of the Jicarillas' Petition is the argument that this case is distinguishable. As will be discussed point by point, however, the holding in *Colorado River* remains controlling.

1. The main thrust of the Jicarillas' argument is that New Mexico's disclaimer clauses in her enabling act and constitution preclude state court jurisdiction over Indian reservations. A review of the wording of the disclaimer dispels this contention. In relevant part it provides that the inhabitants of New Mexico agree and declare:

> . . .that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. (See, Petition, pp. 3-4).

The only obligation New Mexico assumed in this disclaimer lies in her acknowledgment of Congress' plenary control over Indian reservations. In 1952 Congress exercised this control by enacting the McCarran Amendment allowing the adjudication of federal reserved rights held on behalf of Indians in either state or federal courts. Accordingly, New Mexico did not violate the terms of her enabling act or constitution by seeking to adjudicate the interrelated rights to the use of San Juan waters in state court. On the contrary, New Mexico exercised jurisdiction in compliance with the terms of her disclaimer, which is

3. The Jicarillas emphasize the dissenting opinion. The dissent, however, concurs in the majority holding that under the McCarran Amendment the state court had jurisdiction over reservation water rights. (*Id.* at 827). Also, in *Colorado River* Justice Stewart was concerned because the United States had been named as a McCarran defendant in the state court proceedings *after* the federal court action was filed. In this case the United States was named in the state adjudication nine months *before* the Jicarillas sought an independent federal court adjudication.

exactly the Tenth Circuit's holding. (Petition, App. 30a, 32a-33a).

There is a second reason that the existence of New Mexico's disclaimer does not provide a basis upon which to distinguish the holding in *Colorado River.* The disclaimer is an acknowledgment that Congress has plenary power over Indian tribes; it is declaratory in nature instead of conferring some right or power upon the United States. *Van Brocklin v. State of Tennessee,* 117 U.S. 151, 163-169 (1886). Legally, the same mandate is imposed on all fifty states, disclaimer and non-disclaimer states alike, by the Constitution of the United States. Commencing with *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832), this Court has decided a multitude of cases which so hold.[4] Historically, the states have been permitted to exercise control over Indians only when, absent governing acts of Congress, the state action has not interfered with tribal government. Here, there is a governing act of Congress. As was held in *Whyte v. District Court of Montezuma County,* 140 Colo. 344, 346 P.2d 1012, 1015 (1959), *cert. den.* 363 U.S. 829 (1960), "(t)he test is not whether a state has disclaimed jurisdiction, but whether Congress has authorized such a jurisdiction within the state." That the McCarran Amendment authorizes the adjudication of federal reserved rights for Indians in state courts has been squarely determined by this Court.

4. In *Worcester,* Chief Justice Marshall wrote:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States. (*Id.* at 561).

This Court has held that public land and taxation disclaimers in state constitutions are legally unnecessary because the Constitution precludes the state action disclaimed. *Van Brocklin, supra* at 168. For the same reason, Indian disclaimer clauses are unnecessary; they are "not the foundation of the exemption [from state jurisdiction], but [exist] . . .only from abundant caution." *Id.* at 171. Consequently, quite aside from the fact that the McCarran Amendment was an expression of Congress' authority over Indians, the existence of New Mexico's disclaimers provide no basis upon which to distinguish the Court's holding in *Colorado River.*

Lastly, it should be pointed out that although the Jicarillas make much of the existence of New Mexico's disclaimer clause to distinguish this case from *Colorado River*, the identical disclaimer argument was presented in that case without success.[5]

2. The Jicarillas next assert that the Tenth Circuit erred by holding that New Mexico's disclaimer clause was repealed by

5. See, Point IIB3 (pp. 23-26) of the Amici Curiae Brief for the Southern Ute Indian Tribe, Ute Mountain Ute Indian Tribe, Mescalero Apache Tribe, Agua Caliente Band of Mission Indians, Colorado River Indian Tribes, Hualapai Tribe, Gila River Indian Community, Shoshone-Bannock Tribes of the Fort Hall Reservation, Burns Paiute Indian Tribe, Devils Lake Sioux Tribe, Assiniboine and Gros Ventre Tribes of the Fort Belknap Reservation, Pueblo of Zuni, Pueblo of Santo Domingo and National Tribal Chairmen's Association.

When the argument was made in *Colorado River,* the *amici curiae* contended that the special wording of Colorado's disclaimer clause made no material difference to the substantive rights of reservation Indians: ". . . [T]his Court and the Colorado Supreme Court have held that the form, or even the absence, of Indian jurisdictional disclaimer provisions makes no material difference so far as the exercise of state jurisdiction is concerned. *U. S. v. Kagama,* 118 U.S. 375 (1886), *Donnelly v. U. S.,* 228 U.S. 243, 270-272 (1913); *Whyte v. Dist. Ct. of Montezuma County,* 140 Colo. 344, 346 P.2d 1012 (1959), *cert. denied,* 363 U.S. 829 (1960)." (*Id.* at 24, n. 20).

implication.[6] (Petition, p. 17). However, the argument and the line of cases cited in support thereof are irrelevant; the Tenth Circuit did not rule on the basis of repeal by implication. To the contrary, it held that the McCarran Amendment and the disclaimer are compatible and that New Mexico was proceeding to exercise jurisdiction in compliance with the authority reposed in Congress and expressed in McCarran. (Petition, App. 32a-33a). An attack on a holding which the Tenth Circuit did not make does not warrant certiorari.[7]

3. In their point no. 3 the Jicarillas seek the reversal of *Colorado River* upon the unsubstantiated assertion that the decision has caused "much unnecessary as well as duplicative litigation in both the state and federal courts. . . ." We do not agree with the Jicarillas' assertion, but in any event, their complaint lies

6. As part of the argument the Jicarillas state that the McCarran Amendment does not repeal the disclaimer nor confer state court jurisdiction because it does not mention "Indians," "Indian water rights," or "state courts." (Petition, pp. 14, 15). This point was expressly disposed of in *Colorado River* when the Court held that authority to sue Indian tribes may be implied. *Id.* at 812.

7. The Jicarillas also argue that notwithstanding their view that the McCarran Amendment and disclaimer provisions found in most western state constitutions are irreconcilable, "(e)ffect can be given to both by holding that in the disclaimer states the adjudication of Indian water rights must take place in the federal courts. . . ." (Petition, p. 16). This could not be done, of course, unless the rights of all of the non-Indian claimants in a given stream system were also adjudicated in federal court, which is not a burden the federal district courts could reasonably assume. More importantly, to require a federal forum would effectively terminate the western states' on-going efforts to adjudicate water rights for the simple reason that only the Indians or the United States could properly initiate an adjudication. If a state filed suit in federal district court there would be no federal question jurisdiction. See, *State of New Mexico ex rel. S. E. Reynolds, State Engineer v. Molybdenum Corp. of America,* 570 F.2d 1364 (10th Cir. 1978).

with the Congress. The enactment of the McCarran Amendment was an exercise of political power not subject to control by the judicial branch. This long established rule was reiterated in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903):

> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. *Id.* at 568.

The only duplicative litigation in New Mexico has resulted from the United States' and the Indians' tenacious efforts to avoid McCarran jurisdiction of any kind.[8]

4. The Jicarillas contend in point no. 4 that this case is ripe for review. We would concede this point but for the existence of the Court's decision in *Colorado River.* All of the issues presented in this case are there resolved fully and fairly.

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8. The United States has asserted that certain state proceedings do not fall within the embrace of McCarran [*Dugan v. Rank*, 372 U.S. 609 (1963)], that McCarran does not extend to adjudication of federal reserved rights, but only acquired rights [*United States v. District Court in and for Eagle County*, 401 U.S. 520 (1971)], that if McCarran does embrace federal reserved rights they need not be quantified [*Avondale Irrigation Dist. v. North Idaho Properties*, 96 Idaho 1, 523 P.2d 818 (1974)], and that federal reserved rights for Indians are not covered by McCarran (*Colorado River, supra*). The protracted history of litigation based on the United States' unwillingness to accept McCarran jurisdiction is nothing short of remarkable.

5. The Jicarillas next argue that 28 U.S.C. § 1362 confers exclusive jurisdiction on federal courts over Indian-initiated lawsuits – that, in effect, the McCarran Amendment is accordingly repealed or limited by implication. A similar argument was made in *Colorado River* where it was asserted that Public Law 83-280 repealed or amended the McCarran Amendment. The Court's express rejection of this implied repealer argument is equally applicable here: ". . .There being no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of priority of enactment. . . ." (*Id.* at 812).

6. The Jicarillas contend that application of the McCarran Amendment as construed in *Colorado River* is injurious to Indians because of state court prejudice, contrary to "(t)he policy of leaving Indians free from state jurisdiction. . . ." (Petition, p. 23, citing *McClanahan v. Arizona Tax Commission*, 411 U.S. at 168).

The alleged pressure on state court judges to rule provincially on questions of federal reserved water rights has been argued twice before in this Court. Brief of Petitioner, p. 9, *United States v. District Court in and for Eagle County, supra; Colorado River, supra.* Actual practice in the adjudication of federal reserved rights indicates no appreciable difference between their treatment in state court and federal court. Compare the state district court decision in *Mimbres Valley Irrigation Co. v. Salopek*, 90 N.M. 410, 564 P.2d 615 (1977), aff'd sub nom. *United States v. New Mexico*, ___U.S.___. 98 S. Ct. 3012 (1978), and the federal district court decision in *State of New Mexico ex rel. S. E. Reynolds, State Engineer v. Molybdenum Corp. of America*, No. 9780-Civil, (U.S.D.C.N.M.), respecting federal reserved rights; the more lenient treatment is found in state court. This Court's recent decision in *United States v. New Mexico, supra,* also supports the view that federal and state court judges reason the same way.

The Jicarillas conclude their argument by urging that if the policy of leaving Indians free from state jurisdiction is to be changed, "it should be done so expressly by Congress." As the Tenth Circuit and this Court have held, however, Congress has done so by enacting the McCarran Amendment.[9]

7. The Jicarillas argue that the Tenth Circuit erred by failing to address the issue of "appropriateness of dismissal." A review of the Tenth Circuit's opinion disproves this contention. Both the district court and the Tenth Circuit considered that the state court adjudication was filed nine months before the federal action (Petition, App. 4a, 8a, 15a), that the state court adjudication involved a more comprehensive adjudication of the water rights in the San Juan River Basin, (Petition, App. 4a, 6a, 11a, 12a, and 15a), and that federal court adjudication of the Navajo River would generate piecemeal and incomplete litigation contrary to the policy considerations underlying the McCarran Amendment (Petition, App. 8a, 12a, 14a-16a, 30a, 33a-36a). There was ample consideration by both the district and circuit courts on the issue of appropriateness of dismissal.

The Jicarillas spend considerable time in arguing that the ulterior purpose of the state court adjudication was to bring the United States and its three Indian wards within state court jurisdiction. As was already pointed out in our Statement of the Case, such an assertion is a misrepresentation of the state court case wherein New Mexico has named 1600 defendants and intends to add 1400 more to fully adjudicate all of the interrelated surface and ground water rights to the use of public waters in the San Juan River Basin.

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9. As noted in footnote 6, *supra*, it was concluded in *Colorado River* that even though the McCarran Amendment did not expressly confer jurisdiction to adjudicate federal reserved rights on behalf of Indians such "(a)uthority to sue. . .is implied." *Id.* at 812, citing *Turner v. United States*, 248 U.S. 354 (1919).

POINT II: THE HOLDING IN *COLORADO RIVER* IS CORRECT AND SHOULD STAND UNDISTURBED.

In *Colorado River* the Court stated: "(B)earing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the [McCarran] Amendment excluding [Indian] rights from its coverage would enervate the Amendment's objective."[10] (*Id.* at 811). Reference was made to Senate Report No. 755:

> In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or

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10. The ubiquity of federal reserved rights on behalf of Indians derives from the magnitude of Indian claims. For example, the claims of one tribe in New Mexico are approximately twice the natural supply, quite aside from the conflicting rights of the non-Indian claimants. Likewise, in the San Juan River system, which is tributary to the Colorado, New Mexico's share under the Upper Colorado River Basin Compact is 11¼% of the Upper Basin's share after the deduction of 50,000 acre-feet for Arizona; assuming a full supply, New Mexico is entitled to deplete 838,125 acre-feet annually. Pursuant to the compact, any rights ultimately adjudicated to New Mexico Indians will be accounted against New Mexico's share. However, the combined claims of the Navajos, the Ute Mountain Utes, and the Jicarilla Apaches, the three tribes involved in the San Juan adjudication in state court, will likely total in the millions of acre-feet.

Also, the Jicarilla Reservation is an executive order reservation with the most junior priority of the three tribes in the pending state court proceedings. It might be suggested that one of the primary reasons the Jicarillas are attempting to avoid the San Juan litigation is to prevent the entry of a comprehensive decree which would facilitate administration as against the Navajos and the Utes.

> action affecting one right affects all such rights. Accordingly, all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. (424 U.S. at 812).

Perhaps the most fundamental principle common to all forms of statutory adjudication in the western states is the compulsory joinder of all ascertainable parties. Indeed, the absence of known claimants is jurisdictional. *Dugan v. Rank,* 372 U.S. 609 (1963); *Miller v. Jennings,* 243 F.2d 157 (5th Cir. 1957), *cert. den.* 355 U.S. 827 (1957). As stated by the New Mexico Supreme Court:

> Some court must have exclusive jurisdiction to render an all-embracing judgment. It seems unnecessary to enlarge upon this. Others have well stated it. 3 Kinney on Irrigation and Water Rights (2d Ed.) Section 1568; *Weiland v. Reorganized Catlin Consol. Canal Co.,* 61 Colo. 125, 156 P. 596; *Louden Canal Co. v. Handy Ditch Co.,* 22 Colo. 102, 43 P. 535; *Hazard v. Reservoir Co.,* 87 Colo. 364, 287 P. 854; *Owens v. Snider, et al.,* 52 Okl. 772, 153 P. 833; *Pacific Live Stock v. Lewis,* 241 U.S. 440, 36 S. Ct. 637, 60 L.Ed. 1084; *Snow v. Abalos,* 18 N.M. 681, 140 P. 1044; *Pueblo of Isleta v. Tondre,* (dissenting opinion) 18 N.M. 388, 137 P. 86. [*El Paso & R.I. Ry. Co. v. District Court of the Fifth Judicial District,* 36 N.M. 94, 8 P.2d 1064, 1067-68 (1931)].

Without the participation of all claimants it is impossible to determine the relative and conflicting interests to the use of water in a given stream system, thus defeating the administrative and regulatory purposes of water rights litigation. Without the joinder of all claimants it is also impossible for the individual states to protect all water users in the exercise of their rights, to secure a just distribution of public waters, and to perpetuate water rights in the public record.

Until 1952 it was not possible to thoroughly adjudicate the interrelated rights on a river system. The problem was noted in Senate Report No. 755, 82nd Cong. 1st Sess.: "If a water user. . . is immune from suits and proceedings in the courts for the enforcement of valid decrees, then the years of building the water laws of the Western States. . . to effect honest, fair and equitable division of the public waters will be seriously jeopardized." (*Id.* at p. 5). Accordingly, the waiver of immunity embodied in the McCarran Amendment was a general waiver designed to reach all of the United States' claims to water. For obvious reasons, the Congress refused to amend S. 18 so that the waiver would "not extend to rights asserted by the United States for or on behalf of Indians," as requested by the Department of the Interior. (Sen. Rep. No. 755, p. 8). See, *Colorado River, supra,* pp. 809-812.

Of the seventeen western states which recognize and apply the doctrine of prior appropriation, nine have constitutional disclaimers identical or similar to New Mexico's: Arizona, Idaho, Montana, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Wyoming. Appendix "A" shows graphically that one or more Indian reservations are located on most of the major streams in these states. If New Mexico and the other nine disclaimer states are precluded from adjudicating federal reserved rights on behalf of Indians in state court, they would be severely prejudiced and the Congressional intent underlying the McCarran Amendment clearly violated. The reverse is

not true, however. The Court has already determined that Indian water right claims are no more endangered in state court than in federal court:

> Moreover, the Government's argument [against state court jurisdiction] rests on the incorrect assumption that consent to state jurisdiction for the purpose of determining water rights imperils those rights or in some way breaches the special obligation of the Federal Government to protect Indians. Mere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court for their declaration, a suit which, absent the consent of the Amendment, would eventually be necessitated to resolve conflicting claims to a scarce resource. The Government has not abdicated any responsibility fully to defend Indian rights in state court, and Indian interests may be satisfactorily protected under regimes of state law. (Citations omitted). The Amendment in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights. . . . 424 U.S. 812-813.

The McCarran Amendment is sound public law, providing the only means of ending the uncertainty that federal reserved rights pose for the millions of people in the West who depend upon water rights vested under state law. If it is to be changed the Congress should do so.

CONCLUSION

There is no substantive distinction between the *Colorado River* holding and the case at bar. Because *Colorado River* is

clear, fair and controlling, the Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals should be denied.

Respectfully submitted,

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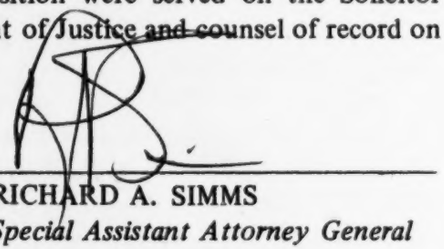
CERTIFICATE OF SERVICE

Pursuant to Rules 42(5) and 33 of the Supreme Court Rules, I certify that three copies of the foregoing Amicus Curiae Brief of New Mexico in Opposition were served on the Solicitor General of the Department of Justice and counsel of record on November 8, 1979.



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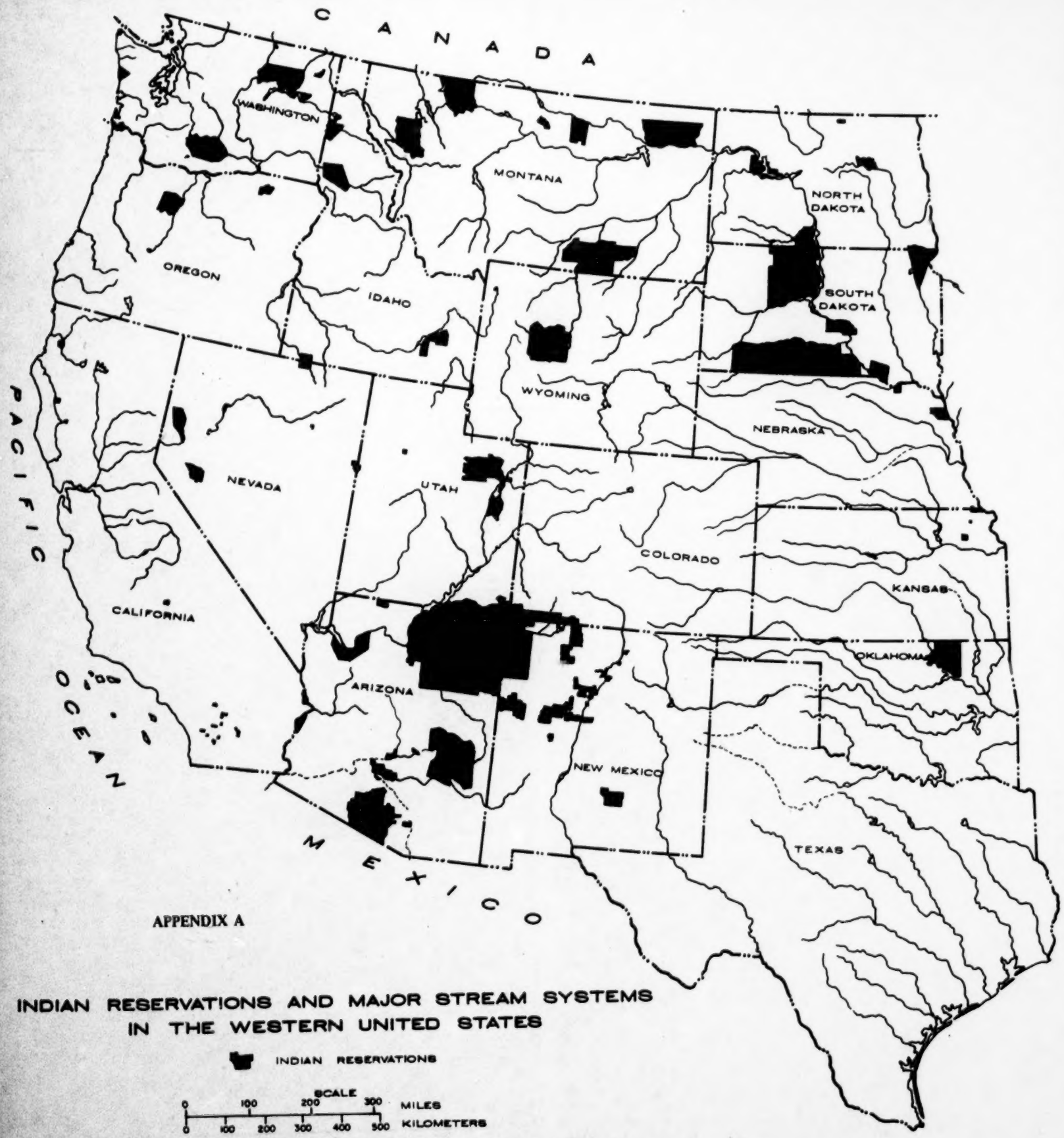

APPENDIX A

INDIAN RESERVATIONS AND MAJOR STREAM SYSTEMS IN THE WESTERN UNITED STATES

Prepared by New Mexico Water Resources Division from National Atlas, Federal Lands (sheet no. 272) compiled by U.S.G.S., 1968.